

FOREWORD: COMPARED TO WHAT?

DONALD L. HOROWITZ*

Several decades ago, the popular comedian Henny Youngman had a routine in which a man walks up to an acquaintance and asks, “How’s your wife?” Whereupon the other replies, “Compared to what?”¹ There are many reasons why this was a laugh line at the time, but buried beneath all of them is one central fact—that human cognition is inexorably based on comparison of one phenomenon with another. The brain sorts and sifts among the plethora of stimuli that confront it and finds some objects heavier than others, some lighter, some bigger, some smaller, some colors lighter, some darker, some people shorter, some taller. There is, indeed, no concept of heavy or big, or light, or short in the abstract, but only by reference to different values on the same scale. Without comparison, the human senses are senseless. When human beings categorize people or things into classes, they do so by compressing quantitative values along a scale into qualitative judgments and contrasting them with more distant values on the same scale: they assimilate, and they differentiate, all the time evaluating relative distance, real or imagined.²

When lawyers speak of a standard as flexible, they must have in mind another standard that can be described as rigid; when they conceive of power as discretionary, they also envision power that is constrained; and when they refer to common-law systems or to adversary institutions, they mean to contrast them to some other systems or institutions. In point of fact, the study of law, like the study of all social phenomena, is always and inevitably comparative. When Clifford Geertz suggested that comparative law involves formulating “the pre-

Copyright © 2003 by Donald L. Horowitz.

* James B. Duke Professor of Law and Political Science, Duke University.

1. This quip, widely attributed to Henny Youngman, is salient in many contexts. See, e.g., Roy Blount Jr., *Relativism as Teflon*, ATLANTIC MONTHLY, Feb. 2001, at 55, 58, available at <http://www.theatlantic.com/issues.2001/2002/blount.htm> (choices among candidates for political office); Allen Demaree, *Feeding the Tiger: Princeton's endowment investments return big numbers*, PRINCETON ALUMNI WEEKLY, Mar. 7, 2001, at 18, available at http://www.princeton.edu/~paw/archive_new/PAW00-01/11-0307/features2.html (investment performance).

2. See generally RICHARD J. EISER, SOCIAL JUDGMENT (1990); LESLIE A. ZEBROWITZ, SOCIAL PERCEPTION (1990).

suppositions, the preoccupations, and the frames of action characteristic of a sort of legal sensibility in terms of those characteristic of another,”³ and that only through comparison could the core of any legal system be understood,⁴ he was not uttering a truth distinctive to legal knowledge but to all knowledge. Everything we think we know about our own legal system we know comparatively, on the basis of counterfactuals, imaginary alternatives, usually conjured foggily.

If the study of law is inherently comparative, the only question is whether the comparisons are to be implicit and ineffable, as they largely are now, or explicit and subject to serious investigation. There is no option not to compare: there is only the option to pretend not to compare or to compare inarticulately. Of course, some subjects can be compared to others within the same legal system, but others cannot be. Law is the last of the social subjects to be studied and taught parochially for the most part, but it is hard to believe that this state of affairs is stable over the long term.

Herbert Bernstein was a superb lawyer who lived by firmly held canons about how comparative law was to be done. Bilingual, bicultural, and blegal, he had a cultivated skepticism of the two traditions in which he had been trained. He could be amused by the foibles of his native land and those of his adopted one as well. But this critical distance never overcame his duties as a participant, as an earnest teacher and student of subjects in both legal systems.

Professor Bernstein understood that it is necessary to get down to specifics—and to get those specifics right—before intelligent comparative work in law could proceed. In an essay quoted by more than one contributor to this symposium, Bernstein called attention to misconceptions about the actual functioning of legal systems that made it impossible to judge whether German or American civil procedure was better suited to deliver accurate results efficiently in litigation.⁵ This intervention was typical of his impatience with vague generalities about law and legal systems. A tolerant man, he had little time for shortcut phrases that described the Anglo-American legal systems as “adversary” but the Continental systems as “inquisitorial.”⁶

Herbert Bernstein had good reason to know that legal systems do not live by general conditions but by the very specific conditions in

3. CLIFFORD GEERTZ, *LOCAL KNOWLEDGE* 218 (1983).

4. *Id.*

5. Herbert L. Bernstein, *Whose Advantage After All? A Comment on the Comparison of Civil Justice Systems*, 21 U.C. DAVIS L. REV. 587 (1988).

6. *Id.* at 589-60.

which they find themselves. As Paul Haagen's fine contribution to this volume explains, Bernstein's own survival in wartime Nazi Germany was very much a function of the particular circumstances into which he was thrust.⁷ His home city of Hamburg was heavily bombed, and he was sent out of the city to live, for varying periods, in a pig sty and in a Bavarian convent. His ability to adapt to those inhospitable conditions kept him alive.

Several other contributions to this volume pay tribute to Bernstein by making the same point about the perils that glib system-level generalities pose for intelligent comparison. Jonathan Wiener's thoughtful article confronts the conventional wisdom that, in environmental regulation, European law is "precautionary" and "proactive," while American law is reactive: it waits for evidence of harm to accumulate and only acts after the fact.⁸ Wiener shows that Europe is more precautionary than the United States on some risks, less on others, that there is convergence of the two on some issues, divergence on others, and a great deal of hybridization overall. From these findings, he goes on to enunciate seven cautions about comparison, all of which underscore, in a spirit congenial to Bernstein's insight, that the supposed uniqueness of any legal system or its rules in a given area is likely to be highly suspect.

In their separate contributions on statutory interpretation, Richard Danner and Claire Germain document converging tendencies in the United States, England, and France. In systems portrayed as differing in general and on specific questions of interpretation of statutes, Danner and Germain show, not merely a growing willingness to resort to legislative history, but similar trends in the availability of the materials that can be utilized by judges, and they voice similar doubts about the reliability of some of those materials.⁹

Neil Vidmar's essay is not explicitly comparative, but it deals with misconceptions about the civil jury system that are widely entertained abroad and, for that matter, at home.¹⁰ He shows that judges

7. Paul H. Haagen, *A Hamburg Childhood: The Early Life of Herbert Bernstein*, 13 DUKE J. COMP. & INT'L L. 7 (Special Issue 2003).

8. Jonathan B. Wiener, *Whose Precaution After All? A Comment on the Comparison and Evolution of Risk Regulatory Systems*, 13 DUKE J. COMP. & INT'L L. 207 (Special Issue 2003).

9. Richard A. Danner, *Justice Jackson's Lament: Historical and Comparative Perspectives on the Availability of Legislative History*, 13 DUKE J. COMP. & INT'L L. 151 (Special Issue 2003); Claire M. Germain, *Approaches to Statutory Interpretation and Legislative History in France*, 13 DUKE J. COMP. & INT'L L. 195 (Special Issue 2003).

10. Neil Vidmar, *The American Civil Jury for Ausländer (Foreigners)*, 13 DUKE J. COMP. & INT'L L. 95 (Special Issue 2003).

and juries tend to agree on verdicts (though jury awards to plaintiffs tend to be higher than the estimates of damages by judges), and he argues that juries do not act capriciously, whatever preconceptions might be entertained to the contrary.

Concerned as he always was to get specifics right, Bernstein was not simply a little-picture person. On the contrary, he was acutely aware that any legal rule, doctrine, or way of thinking about law was indissolubly linked to other rules, doctrines, and legal institutions. It is, therefore, equally hazardous for the enterprise of comparative analysis to risk getting the big picture wrong. Bernstein made this clear in an incisive essay he wrote comparing the General Principles of Civil Law enacted by the People's Republic of China with the German Civil Code that had influenced Chinese law, off and on, for the greater part of a century.¹¹ It is no accident that he begins his assessment by comparing the divergent political and security conditions in Germany at the time the Civil Code was adopted in the late nineteenth century with those in China during the twentieth.¹² Whereas Germany had experienced an extraordinary period of stability, conducive to twenty years of reflection about the shape of the law, China had been through multiple upheavals, and China had had to improvise by enacting statutes piecemeal. This macro-level contrast provides the foundation for the ensuing analysis of the modest Chinese effort at legal systematization. Getting the particulars right was necessary, but the comparison of particulars by themselves would have been incomprehensible, even incoherent.

The connection of a particular legal rule or institution to the whole array of legal institutions constitutes a principal theme in the remaining contributions to this issue. This emphasis on interconnections and their inevitability pervades contributions focused on procedural institutions as it does those dealing with substantive law.

Two articles concerned with the civil justice system make this point. Paul Carrington's discussion of the American jury explains that, in the colonial period, juries were a bulwark against royal judges.¹³ Later, the Anti-Federalists favored them as a protection against an overbearing federal judiciary, and citizen participation on juries today relieves some of the pressure on judges who have a rela-

11. Herbert Bernstein, *The PRC's General Principles from a German Perspective*, 52 *LAW & CONTEMP. PROBS.* 117 (Spring-Summer 1989).

12. *Id.* at 119-20.

13. Paul D. Carrington, *The Civil Jury and American Democracy*, 13 *DUKE J. COMP. & INT'L L.* 79 (Special Issue 2003).

tively large political role to play. In systems in which judges are more removed from political decision making, community participation, Carrington contends, is less urgent. Despite his rather different evaluation of the jury, Hein Kötz understands it in a somewhat similar way.¹⁴ The jury, he appreciates, is connected to the broader role of American courts than of German courts in vindicating general public policy concerns rather than merely deciding relatively minor disputes between private parties. To focus on the jury without examining the scope of the responsibilities of courts would not yield useful insights, Kötz suggests in a contribution that is adapted from the first Herbert Bernstein Memorial Lecture, at Duke Law School, delivered in 2002.

Thomas D. Rowe's carefully reasoned essay takes on the subtle interplay between class actions and the compensation of lawyers.¹⁵ The class action is an American institution that has begun to spread to Canada, Australia, further afield to Sweden, and even, in modified form, to China and Indonesia. For the class action to take root, however, a change in attorney fee arrangements may be required. The customary loser-pays rule, which prevails outside the United States, risks imposing large fees on a class of small plaintiffs in the event of defeat. Likewise, a prohibition on contingent fees might prevent plaintiffs' lawyers from spreading the risk of loss across multiple cases and inhibiting class-action plaintiffs from bringing suit. In other words, one feature of the civil justice system is inextricably tied to another that is formally unrelated to it. To borrow the one may ultimately require changing the other.

A similar theme is sounded, without as extensive an explicit comparative element, in Deborah DeMott's treatment of the imputation of an agent's knowledge of some fact or event to the agent's principal.¹⁶ DeMott discusses the legal justifications for imputing such knowledge, to be sure, but she also notes that the creation of the corporate form may make imputation inevitable. One fictitious institution, in short, necessitates another.

Steven Schwarcz's article begins by asking why, despite its Roman-law origins, trust law is more highly developed in Anglo-

14. Hein Kötz, *Civil Justice Systems in Europe and the United States*, 13 DUKE J. COMP. & INT'L L. 61 (Special Issue 2003).

15. Thomas D. Rowe, *Shift Happens: Pressure on Foreign Attorney-Fee Paradigms from Class Actions*, 13 DUKE J. COMP. & INT'L L. 125 (Special Issue 2003).

16. Deborah A. DeMott, *When is a Principal Charged With an Agent's Knowledge?*, 13 DUKE J. COMP. & INT'L L. 291 (Special Issue 2003).

American systems than it is in continental European systems.¹⁷ The commercial trust, in particular, is increasingly important in the United States. This Schwarcz relates to certain features of the tax system and of the governance characteristics of trusts, as against corporations, and he hints that this is where analysts would need to look to explain the absence of similar vehicles elsewhere.

The interpretation of the Convention on Contracts for the International Sale of Goods is the subject of the article by Herbert Bernstein's collaborator and co-author Joseph Lookofsky.¹⁸ The convention, ratified by more than 60 states, is a uniform law to be interpreted uniformly. Nevertheless, the CISG is often interpreted parochially, because its interpreters are the courts of ratifying states: there is no supranational judicial body to which national judgments can be appealed. Underlying these differences of interpretation are differences among legal systems that make application of even some of the convention's clear terms problematic.¹⁹

Virtually all of the articles in this issue thus make one or both of Bernstein's points about comparison in law—that it needs to be highly specific and that it needs to be founded on wide-ranging knowledge of conditions, rules, and institutions that may or may not be formally related to the specific subject of the comparison. To fulfill these two requisites simultaneously is difficult, which helps to explain the continuing paucity of comparative legal analysis that is persuasive and satisfying. Herbert Bernstein had the capacity to perform both tasks. Every so often he would put on a dazzling display of legal knowledge and of his ability to deploy it, always without a trace of pretension and always in the hope that it might help a student or colleague improve some work in progress or even some thought in progress. Duke was exceedingly fortunate that he spent so much of his career with us.

17. Steven L. Schwarcz, *Commercial Trusts as Business Organizations: an Invitation to Comparatists*, 13 DUKE J. COMP. & INT'L L. 321 (Special Issue 2003).

18. Joseph Lookofsky, *In Dubio Pro Conventione? Some Thoughts About Opt-Outs, Computer Programs and Preemption Under the 1980 Vienna Sales Convention (CISG)*, 13 DUKE J. COMP. & INT'L L. 263 (Special Issue 2003).

19. For example, whether the convention's principle of full compensation requires a court in the United States to award attorneys' fees to the winning party or whether such a court should follow the American rule that each party bears its own legal fees. See *id.* at n. 34.